IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 2:15cr110
	)	
JAMES D. WAITES	)	

DEFENDANT'S REPLY SUPPLEMENTAL BRIEF ADDRESSING APPLICATION OF CATEGORICAL APPROACH TO MOTION TO DISMISS

The defendant, James D. Waites, through counsel and pursuant to this Court's October 13, 2015 Order (ECF No. 15), submits this Supplemental Reply Brief respecting Defendant's Motion to Dismiss.

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On October 13, 2015, the Court directed the parties to file supplemental briefing addressing three specific questions. In their October 19th filings, the parties largely agreed on answers to the Court's questions. But the Government used this opportunity to raise additional arguments that stray far beyond the questions asked by the Court. Here, Mr. Waites responds briefly to the issues properly raised in the Government's supplement. Mr. Waites also asks the Court to strike the second Section 3[1] of the Government's supplemental response. If the Court is not inclined to strike this portion of the Government's brief, the Court should still disregard the Government's contentions because they are meritless.

[1] The Government's supplemental response contains two headings numbered "3." Mr. Waites moves to strike the second of these sections. This fourth section of the Government's supplement ventures beyond the three questions the Court asked the parties to address. (*See* ECF No. 22, 12-15.)

I. THE PARTIES AGREE THAT THE CATEGORICAL APPROACH APPLIES AND THAT THE SUBSTANTIVE OFFENSE OF HOBBS ACT ROBBERY IS NOT DIVISIBLE

Mr. Waites and the United States agree that the Court can employ the modified categorical approach here to look at the indictment and determine whether Mr. Waites has been charged with robbery or extortion under the Hobbs Act.[2] Mr. Waites and the United States agree that once the Court has determined that the indictment charges Hobbs Act robbery, the modified categorical approach cannot be used further. As the Government put it, "the substantive offense of Hobbs Act robbery is not divisible."[3] (ECF No. 22, 8.)

II. THE GOVERNMENT IMPROPERLY RAISED NEW ARGUMENTS IN ITS SUPPLEMENT AND—AGAIN—ASKED THE COURT TO IGNORE BINDING PRECEDENT

The Government used the Court's invitation for limited briefing on specific questions to raise new arguments unrelated to the supplemental inquiry. The Court should disregard those arguments, which appear on pages 12-15 of the Government's supplemental response. (ECF No. 22, 12-15.) Local Rules contemplate no briefing after reply briefs are filed. *See* Local R. Crim. P. 47(f) (providing that after the reply brief is filed "[n]o further briefs or written communications may be filed without first obtaining leave of Court."). Without first obtaining leave of Court, the Government should not be permitted to expound upon issues that were fully developed in earlier briefs. Moreover, the Government's primary new argument relies on Supreme Court case from 2007, which in its prior briefing the Government did not cite once. This is not new authority. If the Government wanted the Court to consider its new arguments, it should have raised them at the appropriate time.

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[2] Although not stated explicitly in his initial supplement, Mr. Waites also agrees with the Government that the Court can use the modified categorical approach to distinguish between conspiracies, attempts, and substantive offenses. (*See* ECF No. 22, 10 (noting that the offenses of "attempt" and "conspiracy" are divisible).)

[3] A single sentence of the Government's brief makes an oblique reference to the possibility that Hobbs Act robbery is divisible as to the object of the feared injury. (ECF No. 22, 11.) But the Government provides no explanation for why that might be. And, for all the reasons stated in Mr. Waites' initial supplement, "robbery" is a single element. Juries are never asked to agree unanimously on the means by which it is committed. The Government's musings about possible divisibility are just that. After raising this point, the Government says that the Court need not address it because the Government agrees that "the substantive offense of Hobbs Act robbery is not divisible in a manner that matters here." (ECF No. 22, 8, 11).

Nevertheless, even if the Court is not inclined to ignore these new arguments based on their procedural impropriety, the Court should disregard them because they are wrong.

If it were not clear already, the Government does not think much of the Fourth Circuit's opinion in *United States v. Torres-Miguel*, 701 F.3d 165, 170 (4th Cir. 2012). The crux of the Government's new argument is that the "realistic probability" test from *Gonzales v. Duenas-Alvarez* applies here. 549 U.S. 183, 193 (2007). But even the Government acknowledges that the Fourth Circuit in *Torres-Miguel* held that this test applies only when a court is comparing elements of a prior offense to the elements of "a listed crime with a generic definition." 701 F.3d 165, 170 (4th Cir. 2012). **Torres-Miguel *rejected the exact argument the Government makes here***, noting that "the argument fails because it wrenches the Supreme Court's language in *Duenas–Alvarez* from its context." *Torres-Miguel*, 701 F.3d at 170. The Governments says that *Torres-Miguel* is "mistaken" and "wrong." (ECF No. 22, 15.) It is not. But even if these descriptions were accurate, the Government ignores one critical feature of *Torres-Miguel*: it is "binding."

The Government's other new claims are equally meritless. First, the Government asks the Court to consider "the actual ways that robberies are carried out…as the facts of the defendant's case and countless others vividly demonstrate." (ECF No. 22, 13.) The Government appears to describe a mix of a non-categorical approach (that requires consideration of the actual facts alleged in the indictment) and an "ordinary case" inquiry (similar to what the Supreme

Court just rejected). It is unclear how the Government's suggestion is pertinent to the applicable categorical analysis, which is based solely on legal elements.

Second, the Government observes, "When a defendant aims a gun at a robbery victim's head, the robbery is being accomplished through the use of force or at a minimum threatened force." (ECF No. 22, 13.) That is true. And if that were the "most innocent" conduct proscribed by the Hobbs Act, the pending motion to dismiss could be denied. Of course, it is not. Hobbs Act robbery can be committed by making threats of future injury to intangible property. The Government repeatedly emphasizes more violent ways the Hobbs Act can be violated. But the Court must look at "the most innocent conduct" proscribed by the Hobbs Act, Government emphasis notwithstanding.[4] *Torres-Miguel*, 701 F.3d at 167.

Finally, the Government asserts that Mr. Waites' descriptions of conduct proscribed by the Hobbs Act do not "rely[] on a specifically enumerated means of committing an offense, like sex traffic by 'fraud' considered in *Fuertes*." (ECF No. 22, 13.) Again, the Government is wrong. Mr. Waites relies on the plain text of the Hobbs Act, which says that "robbery" can be committed,

> by obtaining [ ] personal property from the person or in the presence of another, against his will, ***by means of*** actual or threatened force, or violence, or ***fear of injury, immediate or future, to his person or property, or property in his custody or***

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[4] The Government also raises, again, the suggestion that Hobbs Act robbery is the same as common law robbery. It is not. Common law robbery required immediate threats of violence to the person of the victim. *See* W.H.D. Winder, *Development of Blackmail*, 5 Mod. L. Rev. 21, 25 (1941) (noting that common law robbery historically required "a present threat of ***immediate personal violence***") (emphasis added). Hobbs Act robbery can be committed by threats of future injury the intangible property of the victim's family members. Blackstone and Coke may have had certain understandings about robbery being heinous, but they had a fundamentally different notion of what conduct constituted "robbery." The Government tries to import common law terms and historical perceptions into a statutory definition of "robbery" that Congress purposefully ripped from its common law mooring.

> ***possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining***.

18 U.S.C. § 1951. A 'taking by means of fear of future injury to property' is "a specifically enumerated means of committing" robbery under the Hobbs Act. (ECF No. 22, 13.) It is not, however, a means of commission that contemplates the use or threatened use of violent physical force. In any event, the Government's assertion is irrelevant because no "specific enumeration" requirement exists under the law.

In sum, each new argument raised by the Government is untimely and wrong.

* * *

The parties agree that the pure categorical approach must be applied to determine whether the substantive charge of Hobbs Act robbery has as an element the use, attempted use, or threated use of violent physical force. The Government's further arguments are procedurally improper and substantively erroneous. Mr. Waites respectfully asks the Court to apply the categorical approach, find that Hobbs Act robbery is not a crime of violence, and dismiss the § 924(c) charges.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 23rd day of October, 2015, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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